UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-1321, 01-1549

HARTMAN BROTHERS HEATING
AND AIR-CONDITIONING, INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 20

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

The jurisdictional statement of Hartman Brothers Heating & Air-Conditioning, Incorporated ("the Company") is not complete and correct.

This case is before the Court on the petition of the Company to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Decision and Order against the Company. The Decision and Order of the Board (Members Fox, Liebman, and Hurtgen) issued on December 12, 2000, and is reported at 332 NLRB No. 142. (D&O 1-7.)[1] Sheet Metal Workers' International Association, Local Union No. 20 ("the Union") has intervened on the side of the Board.

The Board had jurisdiction over the unfair labor practice proceedings below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) ("the Act"). The Board's order is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in New Haven, Indiana.

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[1] Record references are to the original record. "D&O" and "ALJD" references are to the decisions of the Board and the administrative law judge, respectively. The consecutively paginated decision of the Board and the administrative law judge is included in a Short Appendix attached to the Board's brief. "Tr" refers to the transcript of the unfair labor practice hearing. "GCX" and "RX" references are to the exhibits of the General Counsel and the Company, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Company filed its petition for review on February 12, 2001. The Board filed its cross-application for enforcement on March 8, 2001. The petition for review and the cross-application for enforcement are timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by sending Michael Starnes home because of his union activity.

The subsidiary issues are (1) whether the issue was fully and fairly litigated, and (2) whether Starnes qualifies as an employee entitled to the protection of the Act.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire James Till, and by refusing to consider him for hire, because of his union membership and activities.

The subsidiary issues are (1) whether the Board reasonably rejected the Company's stated reasons for refusing to consider Till, and (2) whether Till was a bona fide job applicant and an employee within the meaning of the Act.

3. Whether the Company's attacks on the Board's remedial order are properly before the Court.

STATEMENT OF THE CASE

Based upon unfair labor practice charges filed by the Union against the Company, the Board's General Counsel issued a consolidated complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). (ALJD 1; GCX 1(a), 1(b), 1(d), 1(f).) The Company filed an answer to the complaint, denying that it committed any unfair labor practices. (GCX 1(h).) After a hearing, an administrative law judge issued his decision, finding that the Company violated the Act by refusing to hire James Till, and by refusing to consider him for hire. (ALJD 7.)

On December 12, 2000, after timely exceptions were filed, the Board issued its decision, affirming the judge's decision that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to hire Till, and by refusing to consider him for hire. (D&O 2.) The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by sending Michael Starnes home on October 12, 1995. (D&O 1-2.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; on October 12, 1995, the Company Sends New Hire Michael Starnes Home Immediately After He Declares His Intent To Organize the Company's Employees

The Company is a nonunion heating and air-conditioning contractor in New Haven, Indiana. (ALJD 4; Tr 12-13, GCX 1 (f) ¶ 2, GCX 1(h) ¶2.) In October 1995, the Union decided to try to organize the Company's employees. Pursuant to the Union's campaign, union member Michael Starnes applied for a job with the Company on October 10. Although Starnes indicated on his job application that he was a third-year union apprentice, he did not state that he was a union organizer. (ALJD 5; Tr 6-7, 47, 48, 49, 59, 60, 65, 66, GCX 2.) During Starnes' job interview, Company General Manager Richard Hartman stated that the Company was nonunion. (ALJD 5; Tr 11, 12, 39.) Hartman then hired Starnes after calling Starnes' prior employer and receiving a positive reference. (ALJD 5; Tr 41-42.) Hartman added, however, that his insurance company would be checking Starnes' driving record. (ALJD 5; Tr 41-42.)

When Starnes arrived for his first day of work on October 12, Hartman told Starnes that, although he had not yet received the insurance company's report, Starnes could begin work. Hartman then introduced

Starnes to his crew and assigned Starnes some work. (ALJD 5; Tr 18-19, 42, 50-52.)

About 10-15 minutes later, just before he and his crew were about to leave together for a jobsite, Starnes approached General Manager Hartman, and said that he was an organizer for the Union. Starnes added that he would try to organize the Company's employees on breaks. (ALJD 5; Tr 20-21, 42-43, 52.)

Hartman was "shocked" and "dumb founded" by the announcement. (ALJD 5; Tr 43.) When Starnes asked Hartman if he was going to fire him, Hartman rubbed his face, and said "thanks alot." Hartman added that he did not want the Union at his company. (ALJD 5; Tr 52, 79.) Hartman told Starnes to go home and wait until Hartman received the insurance company's report about Starnes' driving record. (ALJD 5; Tr 21, 43, 53.)

B. A Few Hours Later, Union Member James Till Applies for Work; the Company Refuses To Consider or Hire Till

After Hartman sent Starnes home, Starnes visited the union hall and told fellow union organizers James Till and John Kereszturi about the morning's events. (ALJD 5; Tr 53, 82, 83, 104, 105.) The three union members then traveled to the Company's office, whereupon Till and Kereszturi completed job applications. (ALJD 5; Tr 53, 54, 55, 83, 105.)

Kereszturi, who was wearing a union jacket, indicated on his application that he was a union organizer and had 26 years of sheet metal experience. (ALJD 5; Tr 6, 7, 83, 84, GCX 3.) Till, who was wearing a union cap, indicated on his job application that he was a third-year union apprentice and a union organizer. (D&O 2, ALJD 5; Tr 6-7, 84, 107, GCX 4.) The Company never hired Till, and never considered him for hire. (D&O 2, ALJD 7; Tr 29.)[2]

Later that day, the Company's insurance agent notified Hartman that Starnes' driving record was unacceptable. Hartman then informed Starnes that his driving record did not satisfy the Company's insurance criteria and that he was terminated. (D&O 2 & n.5, ALJD 5; Tr 43-44, 55-56, 136, 137, RX 6.)[3]

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2 The Company also refused to hire Kereszturi. The Board found that the Company showed that it would not have hired Kereszturi even absent his union activity, because the Company preferred applicants with less experience. As the Board noted, Kereszturi was overqualified based on his listing of 26 years' experience in the trade. Accordingly, the Board found that the Company did not violate the Act by refusing to hire Kereszturi. (D&O 2 n.9, ALJD 6.)

3 The Board found that the Company showed that it would have discharged Starnes even absent his union activity, because the Company had a practice of not employing individuals with driving records its insurance company deemed unacceptable. Accordingly, the Board found that the Company did not violate the Act by discharging Starnes. (D&O 1 n.5, 2 n.8, ALJD 6.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 12, 2000, the Board (Members Fox, Liebman, and Hurtgen) issued its decision, finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to hire James Till, and by refusing to consider him for hire. (D&O 2 , ALJD 7.) The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by sending Starnes home on October 12. (D&O 1-2.)

The Board's order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O 3, ALJD 7.) Affirmatively, the Board's order requires the Company to offer James Till the position for which he applied, or, if that position no longer exists, a substantially equivalent position. The Board's order also requires the Company to make Till whole for any loss of pay and benefits he may have suffered as a result of the discrimination against him. (D&O 3.)

However, the Board did not order the Company to reinstate Michael Starnes because, as the General Counsel conceded, Starnes' employment was lawfully terminated on receipt of the insurance company report about his

driving record. Instead, the Board ordered the Company to make Starnes whole for any loss of pay and benefits that he may have suffered as a result of the Company's sending him home early on October 12. The Board specifically limited his backpay "to any work hours that he may have lost on October 12." (D&O 2 n. 8, 3.)

The Board's order also requires the Company to remove from its files any reference to the unlawful discrimination against Starnes and Till; to notify them in writing that this has been done, and that the unlawful actions will not be used against them in any way; to notify Till in writing that any future job application will be considered in a nondiscriminatory way; and to post an appropriate notice. (D&O 3-4, ALJD 7.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated the Act by sending Michael Starnes home because he told the Company that he planned to organize the Company's employees. The Company's general manager admitted that Starnes' announcement caused him to conclude that Starnes wasn't the "right guy" for the Company. The Company's admission and the timing of the adverse action--immediately after Starnes' announcement--are just two of the many factors that make the

Company's unlawful motivation for sending Starnes home stunningly obvious.

The Company only indirectly challenges the merits of the Board's finding that antiunion animus prompted the Company to send Starnes home early. Instead, the Company argues that the Board was precluded from finding a violation, because the complaint did not specifically allege that it violated the Act by sending Starnes home. However, the Board was not precluded from finding this unfair labor practice, because the issue of whether the Company violated the Act by sending Starnes home was fully and fairly litigated.

Substantial evidence also supports the Board's finding that the Company unlawfully refused to hire James Till, and refused to consider him for hire, because he was a union organizer. The Company's general manager rejected Till on the very day that he unlawfully sent Starnes home for announcing his intent to organize the Company's employees. This "coincidence" is powerful evidence that the Company likewise unlawfully refused to consider or hire Till because he too was a union organizer. Having just sent Starnes home for revealing his intent to organize company employees, the general manager was in no mood to consider or hire another

union organizer later that very day, even though the Company was short a worker.

There is no merit to the Company's claim that it refused to hire Till because he was overqualified. Uncontroverted evidence establishes that the Company hired applicants with even more experience than Till. Moreover, the Company's false explanation that Till was overqualified undermines its claim that it had a legitimate basis for refusing to consider or hire him.

There is no more merit to the Company's additional claim that it could lawfully refuse to consider or hire Till because, when he applied for work, he was accompanied by another union organizer who assertedly falsified his job application. Whatever the merits of the Company's conclusion about the other applicant, the Company cannot properly tar Till through guilt by association. Accordingly, the Company failed to show that it had a reasonable basis for rejecting Till.

The Act's strikingly broad definition of the term "employee," as well as settled Supreme Court and in-circuit precedent, requires rejection of the Company's claim that Starnes and Till do not qualify as employees within the meaning of the Act because they assertedly falsified their employment applications. The discriminatees' alleged misrepresentations simply are irrelevant to the issues before the Court. It is settled that in an unlawful

motive case, the focus is on the employer's actual reasons for taking the adverse action at the moment it makes the decision. In this case, there is no evidence that at the time the Company sent Starnes home early, and refused to consider or hire Till, it was even aware of the alleged misrepresentations. Nor is there any evidence that the Company took those adverse actions because of the alleged "deceptions" on their employment applications.

The Supreme Court's opinion in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) ("*Town & Country*"), requires rejection of the Company's additional claim that Till was not a bona fide applicant because he planned to organize the Company for six months. In *Town & County*, the Supreme Court unanimously held that the Act protects from discrimination paid union organizers who apply for work with the intention of organizing the employer, even though they may later leave at the union's direction. *Id.* at 87-88, 91, 96, 98.

Finally, the Company's attacks on the Board's remedial order are not properly before the Court. The Company challenges Till's entitlement in principle to reinstatement with backpay, and Starnes' entitlement to backpay. The Court lacks jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)) to consider those arguments, because the Company never made them in the proceedings before the Board. In any event, the Company's specific

arguments about the precise amounts of backpay it owes, if any, are premature. However meritless they may be, the Company is free to raise them in a subsequent compliance proceeding.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SENDING MICHAEL STARNES HOME BECAUSE OF HIS UNION ACTIVITY

A. Principles Establishing an Employer's Unlawful Employment Action; Standard of Review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Accordingly, it is settled that an employer violates Section 8(a)(3) and (1) of the Act by taking an adverse employment action against an employee because of his union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-398, 401 (1983) ("*Transportation Management*"); *E&L Transport Co. v. NLRB*, 85 F.3d 1258, 1271 (7th Cir. 1996). *See Eaton Technologies, Inc.*, 322 NLRB 848, 850-852 (1997) (placing employee on leave because of her union activities violates the Act).

The critical inquiry in such cases is whether the employer's actions were motivated by antiunion animus. *Van Vlerah Mechanical, Inc. v. NLRB*, 130 F.3d 1258, 1263 (7th Cir. 1997) ("*Van Vlerah*"); *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 691 (7th Cir. 1982). Once it is shown that opposition to union activity was a motivating factor in the employer's decision to take adverse action against an employee, the employer will be found to have violated the Act, unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even absent the individual's union activities. *Transportation Management*, 462 U.S. at 400-404; *Van Vlerah*, 130 F.3d at 1263, 1264; *E&L Transport Co. v. NLRB*, 85 F.3d at 1271. An employer fails to prove that it would have taken the same action even absent the discriminatee's union activity when, for example, the record shows that the employer's justification for the adverse action is false. *Van Vlerah*, 130 F.3d at 1264.

It is settled that motive may be inferred from direct or circumstantial evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Van Vlerah*, 130 F.3d at 1263. Among the factors supporting an inference of unlawful motivation are the employee's union activity; the employer's knowledge of same; coincidence in timing between the adverse action and the employee's union activity; the employer's hostility to union activity; the employer's

inconsistent employment practices; and the employer's reliance on pretextual justifications for the adverse action. *Van Vlerah*, 130 F.3d at 1264; *NLRB v. Shelby Memorial Hospital Ass'n*, 1 F.3d 550, 562-563 (7th Cir. 1993); *Union-Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 491-492 (7th Cir. 1993).

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Board's underlying findings of fact are "conclusive" if they are supported by substantial evidence on the record as a whole. A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). *Accord Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998). The substantial evidence test "gives the [Board] the benefit of the doubt, since it requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree which *could* satisfy a reasonable factfinder." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 377 (1998) (emphasis in original). *See also INS v. Elias-Zacarias*, 502 U.S. 478, 481 & n. 1 (1992) (agency's fact findings will be reversed only if the record compels a contrary conclusion).

Judicial review of the Board's determination with respect to motive is even more "deferential" (*Uniroyal Technology Corp. v. NLRB*, 151 F.3d at 667, 670), because "[d]rawing . . . inferences from the evidence to assess an employer's . . . motive invokes the expertise of the Board." *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). *Accord Van Vlerah*, 130 F.3d at 1264 ("The Board is particularly well suited to analyze cases of unlawful discrimination").

B. Overview of Issues

Before this Court, the Company does not seriously challenge the Board's finding that it sent Starnes home early because he announced his intent to organize company employees. However, the Company's treatment of Starnes mirrors its treatment of Till, and the Company does challenge the Board's findings concerning Till. Additionally, the Company hints (Br 8) at a substantive defense to its treatment of Starnes. Accordingly, we show below that substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by sending Starnes home early.

Rather than directly challenge the merits of the Board's findings with respect to Starnes, the Company focuses its brief on two arguments. First, the Company claims that the Board was precluded from finding that it

unlawfully sent Starnes home, because the unfair labor practice complaint did not allege this precise violation. However, as the Board explained, and as we show below, the events of October 12--including Starnes' being sent home early--were placed at issue in the proceeding, and were fully and fairly litigated.

Secondly, the Company claims that Starnes does not qualify as an "employee" under Section 2(3) of the Act (29 U.S.C. § 152(3)), because he (1) assertedly falsified his job application by indicating that he had been laid off from his previous job, rather than stating that he had taken a leave of absence, and (2) he told the Company that he thought he had one speeding ticket, when in fact he had a few additional infractions. However, as explained below pp. 27-29, the Court lacks jurisdiction to consider the Company's claim, because the Company never raised it in proceedings before the Board. We also show that, in any event, the Company's claim is utterly without merit.

C. The Company Sent Starnes Home Early Because He Announced His Intent To Organize Company Employees

1. Starnes' announcement of his intent to engage in union organizing motivated the Company to send him home

Overwhelming record evidence supports the Board's finding (D&O 1-2) that the Company sent Starnes home "because he announced his intent to

organize the [Company's] employees." In the first place, Starnes' union activity, and the Company's knowledge of it, are uncontroverted. (Tr 20-21.) *See* cases cited above pp. 14-15.

Furthermore, this Court has long recognized that "[t]iming alone may suggest anti-union animus as a motivating factor" in an employer's decision to take adverse action against an employee. *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). Here, as the Board found (ALJD 6; Tr 20-21), General Manager Hartman admitted that he sent Starnes home "immediately after" Starnes announced that he would try to organize the Company's employees. The Company's abrupt decision to send Starnes home on the heels of Starnes' announcement--just minutes into his first work shift, and just as he was about to leave with his crew for a jobsite--makes the Company's unlawful motive "stunningly obvious." *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 959 (2d Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989). *Accord Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (abruptness of the discharges and their timing constitute "persuasive evidence" that the employer moved swiftly to eradicate the union organizers).

The record also contains a virtual admission of the Company's unlawful motivation for sending Starnes homes. As the Board noted (ALJD

5; Tr 43, 52), Hartman, who did not want his company to become unionized, was, to use his own words, "dumb founded" and "shocked" when the employee he had just hired informed him that he would try to organize the Company's employees. As Hartman all too candidly admitted (Tr 43) at the unfair labor practice hearing, Starnes' announcement caused him to conclude that "maybe this isn't the right guy for us." In the circumstances, this statement comes close to constituting "an outright confession" of unlawful motivation for sending Starnes home. *NLRB v. L.C. Ferguson & E.F. Von Seggern*, 257 F.2d 88, 92 (5th Cir. 1958). *Accord L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980). *See U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1317 (7th Cir. 1991) ("*U.S. Marine*") (en banc) (unlawful motive for refusing to hire predecessor's union-represented employees, where employer stated that it did not intend to recognize union or hire enough of predecessor's employees to trigger bargaining obligation), *cert. denied*, 503 U.S. 936 (1992).

The Company's inconsistent treatment of Starnes after learning of his intent to organize employees likewise supports the Board's finding of unlawful motivation. As shown, when General Manager Hartman sent Starnes home early on October 12, Hartman told Starnes that he wanted to wait until he got the insurance company report about Starnes. (ALJD 5; Tr

43, 53.) However, as the Board noted (ALJD 5; Tr 35, 38-39, RX 1), just one week before Starnes was hired, Hartman had permitted another new hire, Thomas Tinsley, to work a full day, even though the Company had not yet received the insurance report about his driving record.

Moreover, as the Company concedes (Br 7-8), just minutes before Starnes announced his intention to organize a union, Hartman had told Starnes that he *could* work even though Hartman had not yet received the insurance report. (ALJD 5, 6; Tr 18-19, 42, 50-52.) In the circumstances, Hartman's abrupt change of heart, and his belated insistence that Starnes could not work until after he received the report, strongly supports the Board's inference of unlawful motivation. *See U.S. Marine*, 944 F.2d at 1316-1317 (inconsistency in employment practices supports Board's finding of unlawful motivation); *NLRB v. Shelby Memorial Hospital Ass'n*, 1 F.3d 550, 562, 567 (7th Cir. 1993) (same).

The Company's reliance on a pretextual justification for sending Starnes home likewise buttresses the Board's finding of unlawful motivation. Before this Court, the Company suggests (Br 8), as it did before the Board (ALJD 6), that Hartman sent Starnes home early because he was insubordinate. As shown below pp. 21-23, however, the Board reasonably found (D&O 2 n.7, ALJD 6) that Hartman's testimony did not support the

Company's claim that Starnes was insubordinate. It is settled that when an employer asserts a neutral reason for its action, and the asserted reason is found to be false, the Board may infer that the true motive is an unlawful one. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *Van Vlerah*, 130 F.3d at 1264; *Union-Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 490-491 (7th Cir. 1993).

2. The Company failed to show that it would have sent Starnes home even absent his union activity

The Company suggests (Br 8) that Hartman decided to send Starnes home early because he spoke in an "insubordinate" manner when he announced his intention to organize company employees. It is settled, however, that an "employer cannot meet his burden simply by articulating a legitimate nondiscriminatory reason" for the challenged action. *E&L Transport Co. v. NLRB*, 85 F.3d 1258, 1271 (7th Cir. 1996). Rather, as shown (pp. 13-14), once the evidence supports an inference of antiunion discrimination, the employer bears the burden of *demonstrating* that it would have taken the same action regardless of the employees' protected activity. *Id.*; *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1342 (D.C. Cir. 1995).

The Company failed to make the requisite showing. Simply put, the judge implicitly discredited (D&O 2 n.7, ALJD 6) Hartman's claim that

Starnes was insubordinate, because Hartman's own testimony failed to establish any insubordination by Starnes. Indeed, Hartman admitted (Tr 127, 129) that Starnes did not yell at him or use any profanity. And although the Company alleges (Br 8) that Starnes made his announcement while standing only 12 to 18 inches away from Hartman, rather than 5 to 10 feet away as Starnes testified (ALJD 5; Tr 77), there is no evidence that Hartman ever asked Starnes to move away from him, or that the Company had any rule prohibiting an employee from standing close to a company official. Hartman's failure to tell Starnes that he was sending him home because of his alleged insubordination further undermines the Company's claim that Hartman took the action for that reason. *See NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 626 (7th Cir. 1981); *Royal Development Co., LTD. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983) (employer's failure to mention to employee an asserted reason for the adverse action at the time the action is taken undermines the justification).

In sum, the Company's assertion (Br 8) that Hartman sent Starnes home because of the manner in which Starnes expressed his intent to engage in protected activity amounts to nothing more than a baseless attack on the judge's decision to discredit Hartman's conclusory testimony that Starnes was insubordinate. It is settled that the Board's credibility findings may not

be disturbed "'unless the party challenging [those determinations] establishes [that] 'exceptional circumstances' justify a different result.'" *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1265 (7th Cir. 1987) (citation omitted). *Accord Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998); *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982) (discussing implicit credibility determinations). The Company presents no extraordinary circumstances that would warrant overturning the judge's credibility determination, and it is therefore entitled to affirmance.

D. The Wording of the Complaint Did Not Preclude the Board from Finding that the Company Unlawfully Sent Starnes Home

Implicitly recognizing the strength of the Board's case on the merits, the Company seeks to avoid the consequences of its unlawful decision to send Starnes home early by claiming (Br 14-19) that the Board was precluded from finding this violation on procedural grounds. The Company points out (Br 16-19) that, although the unfair labor practice complaint alleged that it violated the Act by discharging Starnes on October 12, the complaint did not explicitly allege that it violated the Act by sending Starnes home early that day. (GCX 1(f) ¶5(b).) On that basis, the Company argues

(Br 14-19) that the Board was precluded from finding that it violated the Act by sending Starnes home.

However, it is black letter law that the Board may find a violation that is not specifically alleged in a complaint if all issues surrounding the violation have been litigated fully and fairly. *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1335 & n.8 (7th Cir.) ("This Court has held that 'even where a complaint is devoid of notice of the unfair labor practice found, due process is satisfied where there has been full litigation of the issues'") (citation omitted), *cert. denied*, 439 U.S. 911 (1978); *NLRB v. Katz's Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 763 (2d Cir. 1996) (citation omitted).

The instant case fits comfortably within that precedent. As an initial matter, the course of the proceedings provided the Company with notice that the Company's motive for sending Starnes home on October 12 was at issue. After all, as the Board noted (D&O 1; Tr 9, 10), "[i]n his opening statement at the hearing, the General Counsel explained his theory of the case that the [Company] violated the Act when 'Starnes was immediately sent home or discharged' after he informed . . . Hartman" that he intended to organize the Company's employees. Particularly in light of the General Counsel's remarks in his opening statement, the Board was well warranted in concluding (D&O 1) that the "complaint allegation that Starnes was

unlawfully discharged encompassed the [Company's] act of sending Starnes home on October 12." *Cf. Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1182 (5th Cir. 1982) (General Counsel's oral statements at hearing "should be treated as a gloss on the complaint").

Given the notice provided by the General Counsel's opening statement, it is also not surprising that both parties proceeded at the hearing to litigate fully the Company's motive for sending Starnes home. As the Board found (D&O 1), Hartman and Starnes, the only two individuals with knowledge of the relevant facts, "testified in detail regarding the circumstances surrounding Hartman's sending Starnes home." (Tr 11, 20-21, 42-43, 47, 50-53, 76-80, 121-122, 126-129.) As the Board also found (D&O 1), the judge made findings of fact concerning the event, and rejected the Company's contention, and Hartman's testimony, that he sent Starnes home because he was insubordinate. *See Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1335 & n.8 (7th Cir.) (issue was fully litigated where judge made findings of fact concerning violation not alleged in complaint, even though judge ultimately found that conduct was not unlawful), *cert. denied*, 439 U.S. 911 (1978); *NLRB v. Tricor Products, Inc.*, 636 F.2d 266, 271 (10th Cir. 1980) (constructive discharge not alleged in complaint was fully

litigated, because the only two witnesses with knowledge of the relevant facts testified).

The close factual and legal relationship between the sending home of Starnes and his actual discharge also undermines any claim that the Board denied the Company due process. Both actions took place on the same day, and involved the same decisionmaker, General Manager Hartman. Moreover, the legality of sending Starnes home, and the legality of his discharge, both hinge on the motive of the same company official. And, as the Board observed (D&O 1), the sending home of Starnes was a factual element of the subsequent discharge. In addition, as the Board noted (D&O 1), "the judge expressly found that the [Company's] act of sending Starnes home immediately after Starnes announced that he was a union organizer and intended to organize the [Company's] employees satisfied the General Counsel's initial evidentiary burden to show that Starnes was unlawfully discharged . . . ." *See First Western Bldg. Services, Inc.*, 309 NLRB 591, 608 (1992) (suspension not alleged in complaint but fully litigated was properly found to constitute unfair labor practice; employer's motive for suspension was closely related to its motive for unlawful discharge alleged in complaint).

The Company's failure to show that it would have litigated the case any differently had the complaint explicitly alleged a "sending home" violation further undermines any claim that the Board denied it due process. The Company never moved for a continuance after hearing the General Counsel's opening statement, and it does not even make a claim of prejudice before this Court. *See Industrial, Technical & Professional Employees Div., Nat. Maritime Union of America, AFL-CIO v. NLRB*, 683 F.2d 305, 308 (9th Cir. 1982) (employer's extensive cross-examination of witnesses who testified concerning "surprise" factual allegations belies its claim of prejudice); *NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local 433*, 600 F.2d 770, 775-776 (9th Cir. 1979) (party's failure to object to introduction of evidence concerning unalleged violation undermines its due process challenge), *cert. denied*, 445 U.S. 915 (1980).

In sum, the Board was not precluded from finding this unfair labor practice, because the Company's motivation for sending Starnes home was fully and fairly litigated.

E. The Court Lacks Jurisdiction To Consider the Company's Argument that Starnes Is Not an Employee Within the Meaning of the Act; in Any Event, the Argument Is Meritless

The Company next argues (Br 21-23) that Starnes is not an "employee" within the meaning of Section 2(3) of the Act (29 U.S.C. §

152(3)), because he made misrepresentations when he applied for work. According to the Company (Br 21-23), Starnes stated on his job application that he was laid off by his prior employer, but the Company subsequently discovered at the unfair labor practice hearing that he had taken a leave of absence. The Company also claims (Br 21-23) that Starnes falsely told Hartman that he "thought" he had a speeding ticket, but an insurance report later showed that he had committed three additional infractions (including a second speeding violation) in the five years before his application. (Tr 50, RX 6.)

The short answer to these frivolous claims is that the Court lacks jurisdiction to consider them under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the Company never presented them to the Board in the first instance. Section 10(e) of the Act "precludes a reviewing court from considering an objection that has not been urged before the Board, 'unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.'" *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 & n.10 (1979). The Company does not allege, much less prove, that "extraordinary circumstances" excused its omission.

Settled law also requires rejection of any claim that the Company was relieved of its obligation to present its arguments to the Board, because the

administrative law judge declined to find that the Company violated the Act by sending Starnes home. The judge's ruling does not constitute an extraordinary circumstance that excused the Company's failure to make its argument to the Board. Because the General Counsel excepted to the judge's failure to find that the Company violated the Act by sending Starnes home, the Company knew that this was an issue before the Board. (D&O 1 n.6.) Accordingly, the Company had ample reason, and every opportunity, to make its argument to the Board.

In similar circumstances, this Court has repeatedly held that Section 10(e) of the Act precludes appellate consideration of arguments that a party failed to present to the Board. *See Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB*, 161 F.3d 1047, 1054 (7th Cir. 1998) (Court lacks jurisdiction under Section 10(e) to consider arguments that union failed to present to the Board, even though judge had dismissed complaint against union); *Barton Brands, LTD. v. NLRB*, 529 F.2d 793, 797, 801 (7th Cir. 1976) (Section 10(e) precludes court from considering employer's claim that it failed to present to the Board, even though judge had dismissed the complaint against the employer).

In any event, there is no merit to the Company's argument (Br 21-23) that "liars" do not qualify as employees under Section 2(3) of the Act (29

U.S.C. § 152(3)).[4] As the Supreme Court observed in holding that paid union organizers are employees under Section 2(3) of the Act, "the 'breadth of §2(3)'s definition is striking.'" *Town & Country*, 516 U.S. 85, 91 (1995) (citation omitted). "The Act's definition of 'employee' . . . 'reiterate[s] the breadth of the ordinary dictionary definition' of that term, so that it includes 'any person who works for another in return for financial or other compensation.'" *NLRB v. Kentucky River Community Care, Inc.*, ___ U.S. __, 2001 WL 567713 *3 (2001) (*quoting Town & Country*, 516 U.S. at 90). That definition plainly covers Starnes. Moreover, although the Act's definition contains a list of exceptions, there is no exception for liars.

The Company nevertheless claims (Br 21) that the "import of [*Town*

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[4] Section 2(3) of the Act (29 U.S.C. §152(3)) provides as follows:

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

& Country]'s holding is that a paid union organizer who engages in 'impermissible or unlawful activity' is not an 'employee' under the Act." However, the Supreme Court's opinion supports precisely the opposite conclusion. Indeed, the Supreme Court explicitly noted in *Town & Country* that an "arsonist who is also [a] union member ***is*** still an 'employee'," as is an intoxicated worker who "utterly fail[s] to perform his assigned duties." *Town & Country*, 516 U.S. at 97 (citations omitted) (emphasis added).

Accordingly, even assuming for purposes of argument that Starnes intentionally lied on his application and during his interview, and that his conduct in this regard might constitute a criminal offense under state law, as the Company alleges (Br 22), given *Town & Country*, it does not follow that Starnes' misstatements deprive him of employee status or the Act's protection. Moreover, any claim that such misrepresentations deprive a discriminatee of the Act's protection must be rejected in light of *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 318-325 (1994). In that case, the Supreme Court unanimously held that a discriminatee who gives his employer a false explanation does not forfeit his entitlement to reinstatement and backpay, even if he repeats the lie under oath.

In addition, as this Court has recognized, the fact that a discriminatee "lies" to his employer is simply irrelevant where, as here, the dishonesty did

not in fact motivate the employer to take adverse action against the employee at the time the employer made its decision. *See Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 668, 670-671 (7th Cir. 1998) (crucial determination is employer's motive for taking adverse action, "not whether [the discriminatee] intentionally lied" on his job application).

In this case, Starnes' alleged lies are irrelevant, because the Company does ***not*** argue that it sent Starnes home because he lied on his application or during his interview. In fact, the alleged lies could not possibly have motivated the Company to send Starnes home, because it is undisputed that the Company did not discover "the facts" about Starnes' driving record, or that he had taken a leave of absence from his previous employer, until *after* it sent him home.[5] *See, for example, Transportation Management*, 462 U.S. at 396 (employer could not have relied on employee's misconduct in discharging him, because it did not learn about the misconduct until after it decided to discharge him).

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[5] As the Company concedes (Br 7-8), it sent Starnes home before it received the insurance report about Starnes' driving record. Moreover, there is no evidence that the Company knew when it sent Starnes home that he had taken a leave of absence from his prior employer, and had not been laid off. Indeed, the Company's own brief suggests (Br 7, 22-23) that it did not discover Starnes' leave of absence until the unfair labor practice hearing.

In sum, the Court lacks jurisdiction to consider the Company's argument that Starnes is not an employee. In any event, the Company's argument is inconsistent with the language of the Act and settled Supreme Court and in-circuit precedent.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO HIRE JAMES TILL, AND BY REFUSING TO CONSIDER HIM FOR HIRE

A. Principles Establishing an Employer's Unlawful Refusal To Consider or Hire

It is settled that an employer violates Section 8(a)(3) and (1) of the Act by refusing to hire, and by refusing to consider for hire, applicants because of their union sentiments, membership or activities. *E&L Transport Co. v. NLRB*, 85 F.3d 1258, 1261, 1271, 1273 (7th Cir. 1996); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 226, 228 (D.C. Cir. 1995). As the Supreme Court explained long ago, "[d]iscrimination against union labor in . . . hiring . . . is a dam to self-organization at the source of supply," which "inevitably operates against the whole idea of the legitimacy of organization." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). In *Town & Country*, 516 U.S. at 87-88, 98, the Supreme Court unanimously held that the Act protects from discrimination in regard to hire paid union organizers (or "salts") who apply for work.

As the Company recognizes (Br 25-27), in a refusal to hire case, the General Counsel must show (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicant had the experience or training relevant to the requirements of the position; and (3) that antiunion animus was a motivating factor in the employer's decision not to hire the applicant. *FE*S *(A Division of Thermo Power)*, 331 NLRB No. 20, slip op. at 4, 2000 WL 627640 *6 (May 11, 2000). In a refusal to consider case, the General Counsel need only show that (1) the employer excluded the applicant from the hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicant. *Id.* slip op. at 7, 2000 WL 627640 * 10. Once this is established, the burden shifts to the employer to show that it would not have considered or hired the applicant, even in the absence of his union activity or affiliation. *Id.* slip op. at 4, 7, 2000 WL 627640 *6, *10. *See generally E&L Transport Co. v. NLRB*, 85 F.3d 1258, 1271 (7th Cir. 1996); *U.S. Marine*, 944 F.2d at 1315.

B. Overview of Uncontested and Contested Issues

Before this Court, the Company does not dispute the Board's finding (D&O 2, ALJD 6) that it was hiring or had concrete plans to hire when James Till applied for a job on October 12. Indeed, there was at least one

opening after Till applied, given the Company's October 12 discharge of Starnes. (D&O 2; Tr 15-16, 22-23, 43-44.) The Company also does not contest the Board's further finding (D&O 2-3) that it did not even consider Till for hire. That finding is based on Hartman's admission (Tr 29) that he "didn't really dig into" Till's application, and on the Company's brief below, where it acknowledged that the Company "'did not spend much time reviewing or considering' Till's application." (D&O 3, quoting company brief.) Finally, there can be no serious dispute that Till had relevant experience for employment with the Company. After all, Till had just one year less experience in the trade than Starnes, whom the Company hired, and the Company professed a preference for less experienced employees. (Tr 36-37, GCX 2, GCX 4.)

Instead, the Company challenges the Board's unfair labor practice finding chiefly by claiming (Br 26 n. 8, 29-31) that Till's union status had nothing to do with its refusal to consider or hire him. The Company also claims (Br 23-25, 27-29) that Till was neither an employee nor a bona fide applicant. As we explain below, the Board reasonably found that Till's union status was a motivating factor in the Company's refusal to consider or hire him. The Board also reasonably found that the Company failed to show that it would have taken those actions even absent Till's union status.

Moreover, there is no merit to the Company's claim that Till was not a bona fide applicant or an employee under the Act.

C. Till's Union Affiliation Was a Motivating Factor in the Company's Decision Not To Consider or Hire Him

The record contains overwhelming evidence of the Company's unlawful motivation for refusing to consider or hire Till. As an initial matter, uncontroverted evidence establishes that the Company knew that Till was a union organizer when it refused to consider him for hire. As shown above p. 7, Till indicated on his job application that he was a union organizer. In addition, Starnes, who had been sent home earlier that day for announcing that he was a union organizer, accompanied Till when he submitted his application. (D&O 2, ALJD 5; Tr 53, 54, 55, 83, 105, 106, 107, GCX 4.)

The timing of the Company's refusal to consider or hire Till also strongly supports the Board's finding of unlawful motive. As shown, General Manager Hartman rejected Till within hours after taking action against Starnes because he was a union organizer. As the Board found (ALJD 6), "[h]aving revealed his union animus earlier . . . when he sent Starnes home for the day, Hartman was in no mood to be 'salted' later that day with an application from another union organizer." *See NLRB v. Rich's Precision Foundry*, 667 F.2d 613, 626 (7th Cir. 1981) (coincidence in time

between union activity and adverse action supports finding of unlawful motivation); *Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (simultaneous nature of otherwise unconnected discipline supports Board's finding of unlawful motivation). The fact that the Company would not even consider Till for hire at a time when it needed to replace the discharged Starnes also strongly supports the Board's finding of unlawful motive.

The Company's manifest hostility towards Starnes likewise supports the Board's finding that it unlawfully refused to consider or hire Till. As shown, the Company sent Starnes home because he announced that he would try to organize the Company's employees. This unfair labor practice constitutes powerful evidence that the Company refused to consider or hire Till because he too was a union organizer. As General Manager Hartman admitted (Tr 43), he did not feel that Starnes was the "right guy" for the Company. Plainly, Till was no more the "right guy" for the Company than was Starnes, because he too was a union organizer. In these circumstances, the Board could reasonably infer (D&O 2, ALJD 6) that the Company wanted to have nothing to do with union organizer Till either, for the same unlawful reason that prompted the Company to send Starnes home early. *See U.S. Marine*, 944 F.2d at 1314-1315, 1318 (employer's commission of

other unfair labor practices showing its antiunion animus supports Board's finding of unlawful motive for refusing to hire union applicants), *cert. denied*, 503 U.S. 936 (1992); *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d at 626 (employer's manifest hostility to unionization supports finding of unlawful motive).

D. The Company Failed To Show that It Would Have Refused To Consider or Hire Till Even Absent His Union Activity

1. The Board reasonably rejected as false General Manager Hartman's claim that Till was overqualified

The Company argues (Br 29) that it would have refused to consider or hire Till even absent his union activity because it preferred to hire "inexperienced people," and Till, who had three years experience in the trade, was overqualified. The Company's argument fails, because the record shows that the Company actually hired workers with more experience than Till. As the Board found (ALJD 6), "Till had even less job experience than Starnes," whom the Company had hired just two days before rejecting Till as overqualified.[6] In addition, the Company hired Tinsely, even though he had

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[6] Specifically, it is undisputed that Starnes' job application indicated that he had worked in the sheet metal industry for 4 years, since August 1991. By contrast, Till's application indicated that he had worked in the trade for only 3 years, since October 1992. (Compare GCX 2 to GCX 4.)

four more years' experience than Till. (Compare GCX 4 with RX 1.)[7] In short, the Company's own actions demonstrated that it was willing to hire employees with even more experience than Till, provided that the Company did not think that they would try to unionize its employees. *See Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 226-227, 231, 232 (D.C. Cir. 1995) (employer's actual hiring pattern belies its claim that it refused to hire union members because it preferred inexperienced workers). In these circumstances, the administrative law judge reasonably rejected (ALJD 6) as false Hartman's claim (Tr 32) that he refused to consider or hire Till because he was overqualified.

Moreover, as the Board emphasized (D&O 2), General Manager Hartman's false characterization of Till as overqualified makes it far more likely than not that the Company's real reason for refusing to consider or hire Till was an unlawful one--because he was a union organizer. *See Van Vlerah*, 130 F.3d at 1264 (employer's reliance on pretextual justification supports finding of unlawful motivation); *U.S. Marine*, 944 F.2d at 1316-1317, 1318 (inconsistent hiring practices and false justification undermines

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[7] Tinsely's job application indicated that he had been in the trade for 7 years. (RX 1.)

employer's defense to refusal to hire allegation, and supports Board's finding of unlawful motivation).

2. The Company failed to show that Hartman had a reasonable basis for believing that Till had engaged in misconduct

In explaining his actions on October 12, General Manager Hartman also claimed (Tr 29) that he refused to consider or hire Till because Till applied for work with another union organizer, John Kereszturi. According to the Company (Br 29-31, Tr 29), Hartman concluded that Kereszturi had not submitted a legitimate job application because he "blatantly falsified" his application by listing as his city of residence a "bogus" place, Waynedale, that "anyone" would know was not a real city. (GCX 3.)[8] Relying on a guilt-by-association theory, the Company suggests (Br 29-31) that Hartman could honestly believe that Till's application was likewise tainted. The Company claims (Br 9-10, 13-14, 26 n.8, 29-31) that this asserted taint was Hartman's legitimate business reason for not considering or hiring Till.

It is settled that "the burden of establishing an 'honest belief' of misconduct requires more than the employer's mere assertion that an 'honest belief' of such misconduct was the motivating factor behind the [adverse

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[8] Hartman testified that Waynedale, Indiana, is not a city, but a suburb of Fort Wayne. (Tr 29.)

action]." *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980), *enforced mem.*, 672 F.2d 895 (D.C. Cir. 1981). Rather, meeting the burden "requires some specificity in the record, linking particular employees to particular allegations of misconduct." *Id.*

The Company utterly fails to meet its burden of showing that Hartman had any reasonable basis for concluding that Till had submitted an illegitimate application because *Kereszturi* listed a "bogus" address. Even assuming for purposes of argument that the Company was entitled to conclude that Kereszturi engaged in misconduct by giving a bogus city, Waynedale, as his residence, Till did not state that he resided in Waynedale. Rather, Till wrote on his job application that he resided in Fort Wayne, precisely the same residence listed by Starnes, whom the Company hired. (GCX 2, 4.)

Moreover, "[i]t is well established that the mere fact that an employee was in the company of another employee who commits an act of misconduct will not taint the first employee, without a showing of complicity on the part of that employee in the wrongful activity." *MP Industries, Inc.*, 227 NLRB 1709, 1710 (1977). Accordingly, the mere fact that Kereszturi accompanied Till when Till applied for work does not constitute a reasonable basis for the Company to believe that Till falsified his application. *See Magnolia Manor*

Nursing Home, 284 NLRB 825, 825 n.1, 827, 829-830 (1987) (employer failed to show that it had a reasonable basis for believing that discriminatee had harassed employees, because, although discriminatee was present when harassment occurred, the victims' complaints did not allege harassment by discriminatee). *Cf. Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 257 (6th Cir. 1990) (rejecting employer's claim that it believed that strikers engaged in misconduct warranting its refusal to reinstate them because the evidence failed to establish a "sufficient nexus" between the discharged employees and the strike damage).

E. There Is No Merit to the Company's Claims that Till Was Not a Bona Fide Applicant or a Statutory Employee

Seeking to avoid the consequences of its unlawful refusal to consider or hire Till, the Company repeats (Br 21-22, 23-25)) many of the same meritless arguments on which it relies with respect to Starnes. The Company first makes the wholly unreasonable assertion (Br 27-28) that Till was not a bona fide applicant, because he applied for work with the Company in order to unionize it. The short answer is that in *Town & Country*, the Supreme Court unanimously upheld the Board's conclusion that paid union salts who apply for jobs are entitled to the protection of the Act, even if they "intend[] to try to organize the company if they secure[] the . . . jobs." *Town & Country*, 516 U.S. at 87, 88, 98. Here, Till testified (Tr 120)

that he wanted to work for the Company when he applied. Accordingly, Till was a bona fide applicant. *Cf. Tualatin Electric, Inc. v. NLRB*, ___ F.3d ___, 2001 WL 667893 *3 (D.C. Cir. 2001) (salts are entitled to backpay to remedy the discrimination against them).

The Company fares no better in arguing (Br 27-28) that Till was not a bona fide applicant because he intended to return to his previous job after completing a 6-month stint as a participant in the Union's organizing program. Once again, the Company's argument is fundamentally inconsistent with *Town and Country*, where the Supreme Court rejected the employer's argument about union control over the length of employment. The Court emphasized that such a claim "proves too much," for "[i]f a paid union organizer might quit, leaving a company in the lurch, so too might an unpaid organizer, or a worker who has found a better job, or one whose family wants to move elsewhere." *Id.* at 96.

In addition, although the Company asserts (Br 5) in passing that it hires only "long term employees," and not "temporary employees," there is no evidence that the Company told Till that the position for which he was applying required a long-term commitment. In fact, the Company's job application makes it plain that the Company was not offering Till indefinite employment, or even 6 months of employment. On its application form, the

Company actually warns applicants that "an offer of employment does not create a contractual obligation upon the employer to continue to employ [the applicant] in the future." (GCX 4.)

There is no more merit to the Company's additional claim (Br 21-22, 23-25) that Till, like Starnes, was not an "employee" under Section 2(3) of the Act (29 U.S.C. § 152(3)), because Till assertedly lied on his job application by listing the "net take-home pay" he earned from his previous employer, rather than his gross pay. In the first place, the Company fails to prove that Till lied by giving his net pay. After all, the Company's application form did not specify whether applicants should list gross or net pay. (GCX 4.)

But more fundamentally, even assuming for purposes of argument that Till did intentionally lie, he, like Starnes, still falls within the Act's strikingly broad definition of "employee." *See* pp. 29-31 above (explaining why Starnes is an employee under the Act, even if he lied on his job application). In addition, Till's alleged misrepresentation is irrelevant, because the Company does not claim that it refused to consider or hire him for that reason. *See* pp. 31-32 above (explaining that Starnes' alleged misrepresentations are irrelevant, because the supposed dishonesty did not in fact motivate the Company to treat him adversely). Rather, the Company

claims (Br 29-31) that it refused to consider or hire Till because he was overqualified, and because he was with the "suspicious" Kereszturi. *See* cases cited above pp. 30-32. We have already shown, above pp. 38-42, that the Board properly rejected those explanations.

III. THE COMPANY'S ATTACKS ON THE BOARD'S REMEDIAL ORDER ARE NOT PROPERLY BEFORE THE COURT

A. Principles Establishing the Board's Authority To Award Reinstatement and Backpay; the Bifurcated Nature of Board Proceedings.

Section 10(c) of the Act (29 U.S.C. § 160(c)) "charges the Board with the task of devising remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346 (1953). It "broad[ly] command[s] . . . that upon finding that an unfair labor practice has been committed, the Board 'shall' order the violator to 'take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies' of the Act." *NLRB v. J.H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 262 (1969) (quoting Section 10(c)).

The legitimacy of reinstatement with backpay as a remedy for an unlawful discharge or refusal to hire is thus "beyond dispute." *Id.* at 263. *Accord Kentucky General, Inc. v. NLRB*, 177 F.3d 430, 439 (6th Cir. 1999) (reinstatement with backpay is the "normal" method of remedying an

employer's unlawful refusal to hire union members); *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 755 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). Indeed, a finding of discriminatory employment action "'is presumptive proof that some back pay is owed'" by the violating employer. *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 593 (7th Cir. 1976) (citation omitted). *Accord NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C. Cir. 1972) ("*Madison Courier*").

Requiring that the offending employer make the discriminatee whole has a two-fold objective. *Madison Courier*, 472 F.2d at 1316. First, it "reimburses the innocent employee for the actual losses which he has suffered as a direct result of the employer's improper conduct." *Id.* *Accord NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d at 755 (a "just result" requires reinstatement and backpay for a discriminatee). Second, it "furthers the public interest advanced by the deterrence of such illegal acts." *Madison Courier*, 472 F.2d at 1316. *Accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 n. 13 (1984).

The conventional remedy of reinstatement with backpay serves the same salutary purposes in cases of unlawful discrimination against union salts. *NLRB v. Ferguson Electric Co., Inc.*, 242 F.3d 426, 436 (2d Cir. 2001) ("*Ferguson Electric*"). As the Supreme Court recognized long ago,

discrimination against union applicants "inevitably operates against the whole idea of the legitimacy of organization." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). The reinstatement and backpay remedy protects the right to organize by showing the discriminatee and the Company's other employees that the law will come to their rescue where, as here, an employer unlawfully punishes them for exercising that right. *See Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 541 (1943) ("*Virginia Electric*") ("If employees have some assurance that an employer may not with impunity . . . make them bear the burden of a discriminatory discharge, they may be more confident in the exercise of their statutory rights.").

In this case, the Board acted (D&O 3) in accordance with its usual practice, long approved by the courts, of "order[ing] the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due" the discriminatees. *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 902. *Accord NLRB v. Nickey Chevrolet Sales, Inc.*, 493 F.2d 103, 106 (7th Cir.), *cert. denied*, 419 U.S. 834 (1974). *See Nathanson, Trustee In Bankruptcy v. NLRB*, 344 U.S. 25, 29-30 (1952) ("Once an enforcement order issues the

Board must work out the details of the back pay that is due and the reinstatement of employees that has been directed.").

After the unfair labor practice proceeding is concluded, a Board Compliance Officer calculates the backpay owed by the respondent. If the respondent disputes that figure, the Board's General Counsel issues a compliance specification and notice of hearing. *See* Board Case Handling Manual, Compliance Proceedings (Part Three) Sections 10620, 10620.2, 10621.1, 10622. It is settled that the General Counsel's sole burden at the backpay hearing is to show the gross amount of backpay due. *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 593 (7th Cir. 1976); *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 521 (6th Cir. 1987). Thereafter, the "'burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.'" *Madison Courier*, 472 F.2d at 1318 (citation omitted). *Accord NLRB v. NHE/Freeway, Inc.*, 545 F.2d at 593. For example, in the backpay proceeding, the employer can reduce his backpay liability by showing that the discriminatee failed to make a diligent search for interim employment after the employer unlawfully refused to hire him, or that no backpay is due because the discriminatee's interim earnings equaled or exceeded the wages that he would have earned if the employer had hired him.

The Board's power to fashion remedies "is a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). "Because the relation of remedy to policy is peculiarly a matter of administrative competence" (*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)), it has long been settled that the "particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.'" *Virginia Electric*, 319 U.S. at 539 (citation omitted). The Board's order may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Id.* at 540.

B. The Court Lacks Jurisdiction To Consider the Company's Challenges to the Board's Remedial Order; in Any Event, Those Claims Are Premature

In challenging the Board's order directing the Company to offer Till employment, and to pay backpay to Till and Starnes, the Company makes (Br 31-39) a host of arguments that are not properly before the Court. More specifically, the Company claims (Br 36-37) that it should not be required to offer Till employment because he testified at the unfair labor practice hearing that he would have remained with the Company for only 6 months, and then quit voluntarily to return to his old job. Undermining this claim

that the backpay period is limited to a defined 6 month period, the Company argues (Br 35) that Till is not entitled to any backpay, because the length of time that he would have remained with the Company is "indefinite," "speculative," and controlled solely by the Union. The Company also contends (Br 35-36) that Till and Starnes are not entitled to any backpay, because the wages that they would earn in their capacity as union organizers would exceed the wages that the Company would pay them. In addition, the Company claims (Br 36-39) that Starnes and Till failed to mitigate their damages by seeking interim employment after the Company discriminated against them. Finally, the Company appears to claim (Br 38) that the Union unreasonably limited their searches for interim employment after the unfair labor practices occurred.

None of the Company's arguments is properly before the Court, because the Company never made any of its arguments to the Board in the unfair labor practice proceeding below. Accordingly, the Court lacks jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)) to consider the Company's challenges to Till's entitlement in principle to the traditional remedy of reinstatement with backpay, and to Starnes' entitlement to backpay. *See* cases cited above pp. 28-29.

Settled precedent also requires rejection of any claim that the Company preserved its arguments by its excepting to "all paragraphs and lines" of the judge's order "on the grounds that . . . [it] did not violate the Act by not hiring Till." (Company's exceptions p. 3.)[9] As the D.C. Circuit has noted, such a general exception "is far too broad to preserve a particular issue for appeal." *Quazite Division of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497 (1996) ("*Quazite*"). In *Quazite*, the court observed that by excepting to the remedial order in its entirety, the employer was merely reasserting that it did not violate the Act, and therefore that no remedial order at all was necessary or proper. *Id.* As the court explained, "[a] categorical denial does not place the Board on notice that its particular choice of remedy is under attack . . . ." *Id.* In short, because the Company did not make its fallback arguments to the Board that reinstatement and backpay are inappropriate remedies even if it did discriminate against Till and Starnes, the Court is precluded from considering those arguments now.

In any event, the Company's challenges to the Board's remedial order are unworthy of serious consideration. Simply put, they are premised on a

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[9] Because that exception does not even mention Starnes, it could not possibly even begin to preserve the Company's argument that Starnes is not entitled to backpay.

basic misunderstanding of backpay principles and the bifurcated nature of Board proceedings.

For example, the Company claims (Br 28, 36-37) that Till is not entitled to an offer of employment because he testified at the unfair labor practice hearing that he planned to return to his old job after 6 months with the Company. However, such testimony does not, and cannot, establish a waiver of Till's reinstatement right, because it was given before the Company even offered reinstatement. *Cf. Heinrich Motors, Inc.*, 166 NLRB 783, 785-786 (1967) ("We consistently have discounted statements prior to a good-faith offer of reinstatement, indicating unwillingness to accept reinstatement."), *enforced in pertinent part*, 403 F.2d 145, 150 (2d Cir. 1968).

In addition, regardless of Till's testimony at the unfair labor practice hearing, there is no evidence that he is working for his old employer, or any other employer for that matter, at the present time. Accordingly, there is no evidence that Till will refuse an offer of reinstatement if and when it is made, or that he does not currently desire to work for the Company. *Cf. KSLM-AM & KSD-FM*, 275 NLRB 1342, 1342 n.4 (1985) (in absence of unconditional offer of reinstatement, Board refuses to assume that discriminatee abandoned his entitlement to reinstatement, even though he

found interim employment paying higher wages); *Arista Service, Inc.*, 127 NLRB 499, 500 (1960). The appropriate time and place for the Company to present that evidence, if it exists, is in the backpay proceeding.

The Company's arguments (Br 35) about the length of the backpay period are likewise premature. As noted above pp. 47-48, that issue is not grist for the unfair labor practice case; it is reserved for the subsequent compliance proceeding. In any event, the only two courts to have addressed the issue in such a proceeding have rejected the argument (Co. Br 35) that a salt is not entitled to any backpay because the length of his employment is inherently speculative. *See Tualatin Electric, Inc. v. NLRB*, ___ F.3d ___, 2001 WL 667893 *3 (D.C. Cir. 2001); *Ferguson Electric*, 242 F.3d 426, 431-432 (2d Cir. 2001). In addition, the Company's assertion that the length of Till's backpay period is "speculative" clashes with its assertion (Br 28) that Till would have stayed with the Company for exactly 6 months. In sum, although the Company's claims are obviously meritless, the Company nevertheless will have the opportunity at the compliance stage of these proceedings to argue that any backpay period chosen by the General Counsel is unduly speculative.

The Company's claims that Starnes and Till failed to mitigate their damages by seeking interim employment, and that the Union unreasonably

limited the scope of their searches for interim employment, are also premature, and must be deferred to the compliance stage as well. As is typical in an unfair labor practice case, the record contains no evidence about their searches for interim employment after the Company discriminated against them. The Company will also have the opportunity to present in the compliance proceeding its argument (Br 35-36) that any income that Till and Starnes may have received from the Union during the backpay period should be treated as interim earnings, and deducted from the gross backpay owed by the Company.[10]

In sum, the Court should reject the Company's attacks on the Board's remedial order, because they are not properly before the Court.

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[10] As the Company concedes (Br 34), however, the Second Circuit has already rejected the identical contention. *See Ferguson Electric*, 242 F.3d at 432-433.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the petition for review, and enforcing the Board's order in full.

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